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Comparative ADR

Hybrid ADR processes in South Africa

Barney Jordaan

Despite the fact that several statutes provide for it, ADR processes in general are not well-established or widely used in South Africa. The key exceptions are disputes involving employment law, labour relations and family law.

In South Africa there has of late been renewed interest among members of the legal community in the use of mediation in commercial disputes. A number of private and tertiary institutions[1] have been established with the aim of promoting the use of mediation. There is also talk of government possibly lending its weight to this movement as part of its effort to improve the functioning of the judicial system in general. Exactly what form this might take is difficult to predict at this stage, but the most likely avenue is an amendment to the rules of court to provide for court-annexed mediation.

Currently, however—with the exception of employment law, labour relations and family law disputes (for which specific statutory regimes exist)—ADR processes in civil and commercial disputes are conducted almost exclusively in terms of private agreements between disputants. Logistics and case management are also generally taken care of by private dispute resolution service providers.[2]

Generally[3] there is no legal impediment to parties agreeing to use hybrid processes such as med–arb and arb–med. Yet, as indicated below, these processes are hardly ever used outside the employment law arena. There, a variant of med–arb was established in 2002 as the default process for certain types of rights disputes where the dispute has been referred in terms of the provisions of the Labour Relations Act.[4] As is shown below, arb–med is also provided for in that Act.

Unpopularity of hybrid processes

Generally, the use of hybrid processes such as med–arb and arb–med in civil and commercial disputes is virtually non-existent.[5] The most fundamental criticism of med–arb is that it falls foul of the rules of natural justice. This is because the arbitrator, in the role of mediator, would have been involved in confidential discussions with each party during which key issues could have been raised, without the other party having had an opportunity to hear and respond to what was said.

It can, of course, be argued that by submitting to the med–arb process the parties must be taken to have waived their right to object on this ground, but this does not entirely resolve the dilemma, for the parties may simply become more circumspect both in what they disclose to the mediator and in their conduct during the mediation phase, thereby inhibiting the mediation phase of the process itself.[6]

Arb–med, in turn, suffers from the criticism that although it has the potential to lead to an outcome more acceptable to the opposing parties, it is not really more economical in terms of time and money than a conventional arbitration.[7]

Statutory support for hybrid processes in employment law disputes

The South African Labour Relations Act makes provision for so-called 'disputes of right' to be resolved through conciliation first and, if that fails, through either arbitration or adjudication. Conciliation, in terms of the Act, includes mediation, fact-finding and the making of an advisory award. In practice, conciliation is a fairly robust form of mediation, with commissioners not afraid to express their views about the merits of a matter to the parties in private, and sometimes even in open session. Because of its potential to save costs and reduce case loads, commissioners are under pressure to settle as many disputes as possible through conciliation.[8]

Whether a dispute has to be arbitrated or adjudicated depends on the nature of the issue in dispute.[9] The Labour Court adjudicates disputes over which it has jurisdiction, whereas conciliation and arbitration are mainly

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(although not exclusively) the preserve of the Commission for Conciliation Mediation and Arbitration (CCMA).[10] The overwhelming majority of cases that are referred for arbitration involve dismissal for misconduct or incapacity.

Two hybrid processes are available to commissioners of the CCMA: 'arb–con' and 'con–arb'.

Arb–con and con–arb

The Act provides that a commissioner who has been appointed to arbitrate a dispute of right may, with the consent of the parties, attempt to conciliate the dispute. This can happen at any stage of the arbitration process—that is, prior to or in the course of arbitration. Failing settlement, the arbitration continues with the same commissioner.

Con–arb

Con–arb is compulsory in disputes concerning the dismissal of employees on probation and alleged unfair labour practices relating to probation.[11] In all other dismissal and unfair labour practice disputes, con–arb is the default process. However, any party to the dispute may object in writing prior to the event to the arbitration proceeding immediately after conciliation. In this case, the CCMA is obliged to split the processes and to conduct the arbitration at a later date.[12]

It has become standard practice for lawyers acting for clients in those cases where legal representation is allowed at the CCMA, as a matter of course to lodge an objection to con–arb. This is partly due to the fact that such processes are normally scheduled to take place fairly soon after the dispute has been lodged, in some cases as soon as within 15 days of a referral. This obviously places an enormous amount of pressure on legal representatives in terms of preparation time. Employer advisors, in particular, also often advise clients against opting for the combined process because of a fear of possible bias on the part of the conciliating commissioner.[13]

Where con–arb does take place, it is the norm for the same commissioner to conduct both processes, with arbitration following immediately after conciliation has failed to produce a settlement.

Although there has been an upswing in the use of private conciliation/mediation in labour disputes, rather than through the CCMA[14] (particularly where disputes involve the dismissal of white-collar employees and executives), anecdotal evidence suggests that hybrid processes, including con–arb, are rarely used in the private systems. In approximately 24 years of involvement in dispute settlement, I have personally conducted only a handful of private arb–med processes in disputes over job grading and wage levels.

The future

In 2001 the South African Law Reform Commission recommended a complete overhaul of the (outdated) Arbitration Act 1965.[15] The Commission recommended two separate statutes: one covering domestic and the other international arbitration. It also recommended that the UNCITRAL Model Law should not be adopted for domestic arbitrations (as opposed to international arbitrations) and, significantly for current purposes, that parties to arbitration should also have access to med–arb or arb–med, provided they agree to it.

Two policy arguments were relied on for this proposal.

First, it is notorious that commercial arbitrations are often protracted and very expensive. Therefore disputants who are interested in resolving their dispute as opposed to delaying payment should logically consider mediation as a first option. The inclusion of some provisions on mediation would indicate an official policy supportive of cost-effective and expeditious resolution of commercial disputes through mediation.

Secondly, mediation as a method of dispute resolution is apparently more in keeping with traditional African methods of dispute resolution than the adversarial procedure of the (English) common law.[16]

Recognising the pitfalls inherent in these processes, the Commission

recommended certain safeguards in a draft Bill published as part of its report. Those safeguards are contained in sections 13 to 15 of the draft Bill, the essence of which follows.

Parties must expressly agree to med–arb or arb–med.

If the parties fail to appoint a mediator, one can be appointed for them by a court or other body with the necessary authority.

Where an arbitration agreement provides for med–arb or arb–med, a party to the agreement may not object to the appointment of the mediator as arbitrator, or to that person's conduct of the arbitral proceedings, solely on the ground that such person has previously acted as a mediator in connection with some or all of the matters referred to arbitration.

Where a party has chosen to disclose confidential information to a mediator during mediation proceedings, the mediator must before proceeding to act as arbitrator, disclose to all other parties to the arbitral proceedings as much of that information as the mediator considers material to the arbitral proceedings.[17]

To counteract delaying tactics, if the mediation proceedings fail to produce a settlement acceptable to the parties within 28 days from the date the mediation proceedings started, or such other period agreed to by the parties, the mediation proceedings must terminate. The parties may agree otherwise.

Where an agreement provides for the arbitrator to act as mediator, the arbitrator may communicate with the parties collectively or separately.

Settlement agreements arrived at through mediation are enforceable by the courts as an award on agreed terms.

Arbitrators enjoy certain indemnities; also when acting as mediators.

The Commission's report also includes a draft Bill for international arbitrations which, in sections 13 to 15, contain arb–med and med–arb provisions that are broadly similar to those set out above. One key exception is that parties to an international arbitration who have consented to mediation may withdraw their consent at any time. Where mediation (conciliation) is provided for in an arbitration agreement, the parties may opt for the UNCITRAL conciliation rules to apply.

> It has become standard practice for lawyers acting for clients in those cases where legal representation is allowed at the CCMA, as a matter of course to lodge an objection to con–arb. This is partly due to the fact that such processes are normally scheduled to take place fairly soon after the dispute has been lodged, in some cases as soon as within 15 days of a referral.

Passage of the Bills has been delayed and there is as yet no indication of whether and when they will be put before Parliament.

Conclusion

While there is, with some exceptions, no prohibition on the use of med–arb and arb–med, these processes are not generally encountered in commercial and civil disputes in South Africa. However, both processes are specifically provided for in labour relations legislation. Recommendations of the South African Law Reform Commission regarding arbitration reforms, if adopted by Parliament at some point in the future, will make these processes part of the standard legal landscape.

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Endnotes

1. The Africa Centre for Dispute Settlement was established at the Graduate School of Business of Stellenbosch University in February 2008 with the aim of promoting the use of dialogue and mediation to resolve disputes at all levels, including civil and commercial disputes. Its patron is Archbishop Emeritus Desmond Tutu — see <www.usb.ac.za/disputesettlement>.

2. The two leading private dispute resolution service providers are Equillore Ltd <www.equillore.com> and Tokiso Dispute Settlement <www.tokiso.com>.

3. Status and divorce matters being two of the main exceptions: arbitration is excluded in such matters.

4. Of 1995, as amended. Employers, employees and trade unions are not

compelled to rely on the provisions of the Act for the resolution of their disputes and may instead opt for private processes. Two of the drawbacks of the statutory process are that the parties have little control over set-down dates and no choice of presiding officer.

5. As confirmed to the author by the private agencies referred to in note 2 above, with the exception of disputes in employment. Arb–med has been used on a few occasions, but then in wage disputes and not rights disputes.

6. One option, of course, is to provide that the entire mediation process should take place in open session. See Alan L Limbury, 'Med–Arb, Arb–Med, Neg–Arb and ODR'<www.strategic-resolution.com/documents/Paper%20for%20IAMA%20Forum%203%20August%202005.doc>. Another option is to use different neutrals for the different phases, but this again inhibits the economy and efficiency of the process.

7. D Butler and E Finsen, *Arbitration in South Africa*, 203 (1993). The Chartered Institute of Arbitrators' policy is that it is unethical for a mediator to act as an arbitrator. It has also been suggested that irregularities in connection with the med–arb process could lead to an award being unenforceable as a result of a potential challenge under Article V of the 1958 New York Convention. See the Chartered Institute of Arbitrators, 'News Watch', 5 June 2006. But see A Marriot, 'Arbitrators and Settlement' in 70(4) *Arbitration International* 297 (2004), who argues that too much is sometimes made of the downsides of the process.

8. For the year 2007–08, sixty-three per cent of all disputes referred to the CCMA were reportedly settled at conciliation: Tokiso Dispute Settlement, *Annual report on the state of labour dispute resolution in South Africa* 15 (hereinafter 'Tokiso Review'; *tokiso* is an indigenous term meaning 'to settle'). At 38 the authors of the report express doubt over the accuracy of this figure, suggesting that the rate is perhaps a little optimistic. They are also 'unconvinced' that the settlement rate alone is an appropriate measure of success.

9. For example, disputes over dismissals for misconduct or incapacity, as well as unfair labour practice disputes, are resolved through arbitration where conciliation fails. Disputes involving the dismissal of strikers and redundancies involving more than one person are resolved through adjudication, if conciliation has failed.

10. It should be noted that nothing in the Act prevents parties from opting for private mediation or arbitration, instead of the statutory process. While the statutory processes are used most frequently, a sizable number of employment disputes end up in private mediation and arbitration. The reasons for this are varied and sometimes include concern over the quality of commissioners coupled with the fact that parties are not free to choose the commissioner if they opt for the statutory system.

11. An example is an arbitrary and unilateral extension of a probationary period. Amendments to the Labour Relations Act have been tabled. If implemented, they will make con–arb the default process in all rights disputes dealt with by the CCMA.

12. Provision is made in the Act for a party to object to the same commissioner conducting both processes.

13. See, for example, 'Con-arb: good idea or bad mistake?' at <www.manufacturinghub.co.za/20081128_0001.htm> and <www.labourlawadvice.co.za/Snippet%20-%2012%20May%202008.htm>.

14. Tokiso Review, 15.

15. In broad terms, the Act applies to all arbitrations conducted in terms of a written arbitration agreement, save where the arbitration provisions of the Labour Relations Act apply.

16. See <www.doj.gov.za/salrc/reports/r_prj94_dom2001.pdf> at para 3.90 of the Commission's report.

17. The mediator is not disclosing privileged information without the relevant party's consent because that party is taken to have consented to disclosure when agreeing to the same person acting as mediator and arbitrator.